UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2825, 00-3758

CITIZENS PUBLISHING AND PRINTING COMPANY;
RYAN KEGEL; SCOTT KEGEL, Alter Egos

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Citizens Publishing and Printing Company, and Ryan Kegel and Scott Kegel, alter egos (collectively, "the Company") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, a final Board order issued against the Company.

The decision and order of the Board issued on August 31, 2000, and is reported at 331 NLRB No. 176.[1]

The Board had subject matter jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices. The Board's order is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction under Section 10(e) and (f) of the Act, the unfair labor practices having occurred in Ellwood City and Beaver Falls, Pennsylvania. The Company's petition for review was filed on September 27, 2000, and the Board's cross-application for enforcement was filed on November 9, 2000. The petition and cross-application were timely filed; the Act places no time limit on such filings.

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[1] "A" refers to the appendix filed by the Company. "Supp A" refers to the supplemental appendix filed by the Board. "D&O" refers to the Board's Decision and Order, located in Appendix 1 attached to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting bargaining unit photography work.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by falsely informing the Union that striking employees had been permanently replaced and by failing to immediately reinstate the strikers upon their unconditional offer to return to work.

STATEMENT OF THE CASE

Acting on several unfair labor practice charges filed by the Teamsters, Local Union No. 261 ("the Union"), the Board's General Counsel issued a consolidated complaint alleging that the Company had violated Section 8(a)(5), (3), and (1) of the Act (29 U.S.C. § 158(a)(5), (3), and (1)) by unilaterally subcontracting bargaining unit work, by falsely informing the strikers that they had been permanently replaced, and by failing to immediately reinstate the strikers upon their unconditional offer to return to work. (D&O 5-19; Supp A 2-14.).[2] Following a hearing, an administrative law judge issued a decision on June 30,

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[2] The complaint also contained allegations related to the Company's prosecution of libel actions in state court. Prior to the issuance of its order, however, the Board severed the issues pertaining to the state court actions and, ultimately, dismissed those complaint allegations. (D&O 1 n.2.)

1997, sustaining the Section 8(a)(5), (3), and (1) allegations of the complaint. After the Company filed exceptions to the administrative law judge's decision, the Board issued its decision and order, affirming the administrative law judge's rulings, findings, and conclusions, and adopting his recommended order. (D&O 1-5.) The Board's findings of fact are summarized directly below; its conclusions and order are described immediately thereafter.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company Alters the Full-Time Photographer's Duties to Include Night and Weekend Photography Work

The Company, which has offices in Ellwood City and Beaver Falls, Pennsylvania, publishes, circulates, and distributes the Ellwood City Ledger ("the Ledger"), a daily newspaper. (D&O 5; Supp A 53.) The Company is a family-owned corporation, operated by brothers W. Ryan ("Ryan") Kegel and Scott Kegel. (D&O 6; Supp A 32.) Ryan Kegel, the vice president and publisher, exercises overall authority over the Ledger. (D&O 6; Supp A 46, 56.) Scott Kegel, the general manager, shares responsibility for the paper's day-to-day operations with Ryan. (D&O 6; Supp A 32.)

The events relevant to the instant case began in 1993. Prior to that time, Bud Dimeo was the Ledger's sole full-time photographer. As the full-time photographer, Dimeo worked days, taking photographs and doing darkroom work. (D&O 1, 6; Supp A 38-39, 88-89.) To cover the Ledger's night and weekend

("n/w") photographic needs, the Company hired "stringers," independent contractors who were paid per photograph. (D&O 1, 6; Supp A 41-42.)

In 1993, the daytime photography work began to decline, so that sufficient work to sustain the full-time photographer position no longer existed. (D&O 1; Supp A 54, 101-03.) As a result, in August 1993, the Company assigned n/w photography work to Dimeo as part of his regular duties. (D&O 1, 6; Supp A 88-89.) From August 1993 until his retirement in January 1995, Dimeo was responsible for the majority of the Ledger's n/w photography work. Because the n/w work was part of his full-time duties, Dimeo did not receive additional compensation for the n/w photographs. (D&O 1, 7; Supp A 55.)

During this time, Mark Crepp, the full-time sports editor for the Ledger, also took n/w photographs. The Company paid Crepp per picture for his n/w work. In addition, the Company occasionally hired stringers to perform n/w work. (D&O 1, 6-7, n.16; Supp A 40, 69.)

B. The Board Certifies the Union as the Employees' Bargaining Representative; the Parties Begin Negotiations; the Company Insists that the Full-Time Photographer's Duties Include N/W Work

In December 1993, the Board certified Teamsters Local No. 261 ("the Union") as the exclusive collective-bargaining representative of the Company's employees. The certified bargaining unit did not include stringers. (D&O 6; Supp A 15, 26, 34.)

In early 1994, the parties began negotiations for an initial collective-bargaining agreement. (D&O 6; Supp A 28, 70.) During the negotiations, the parties discussed the issue of subcontracting work to stringers. On June 3, the parties agreed that the Company would continue its past practice during negotiations. (D&O 1, 7; Supp A 77-79.) On June 4, the Union requested that the Company hire a stringer to take n/w photographs in order to enable Dimeo to spend more time with his ailing wife. The Company refused, insisting that it was not going to give Dimeo 40 hours' pay to work part-time. (D&O 1, 7; Supp A 88-89.)

C. The Company Unilaterally Removes N/W Photography Work from the Full-Time Photographer's Duties; in Response, the Union Files an Unfair Labor Practice Charge; the Employees Vote To Strike in Response to the Company's Subcontracting of Bargaining Unit Work

When Dimeo retired in January 1995, the Company assigned sports editor Crepp to be the temporary full-time photographer. (D&O 7; Supp A 43.) In addition to his new photography duties, Crepp also alternated as a weekend sports editor, wrote sports stories, assisted with the layout of the sports section, and worked on an annual business supplement published by the Company. (D&O 1, 7; Supp A 65-68.) In March, Crepp informed company management that he was having difficulty completing the n/w photography work that Dimeo had previously performed. (D&O 1, 7; Supp A 45, 68.) In response, the Company hired stringers

to cover the n/w work. (D&O 1, 7; Supp A 44.) The Company did not notify the Union of its decision to subcontract the n/w work previously assigned to the full-time photographer, nor did it give the Union the opportunity to bargain over its decision. (D&O 12; Supp A 71-72.)

At the parties' next negotiating session, on April 11, the Union asserted that the Company had unilaterally removed photography work from the bargaining unit by subcontracting the n/w work. The Company refused to rescind its action. (D&O 7; Supp A 104-06.) On April 18, the Union filed an unfair labor practice charge with the Board alleging that the Company, in subcontracting the n/w work, had unilaterally changed terms and conditions of employment without bargaining. (D&O 7; Supp A 1.)

On July 21, the Union learned that the Board intended to issue a complaint based upon the Union's unfair labor practice charge. (D&O 8; Supp A 30-31.) On July 23, the Union met with the employees and informed them of the Company's unilateral change and its refusal to rescind its action, as well as the impending Board complaint. (D&O 8; Supp A 60, 73-76, 86, 90-92.) After learning of the Company's unfair labor practice, numerous employees indicated their desire to go on strike, and the membership held a strike vote. (D&O 13; Supp A 59-61, 90-92.) The membership voted to strike and, the next day, went on strike. (D&O 8; Supp A 27.)

D. The Company Hires Temporary Replacement Workers; the Union Informs the Company of its Intention To Make an Unconditional Offer To Return to Work on Behalf of the Strikers; the Company Falsely Informs the Union that the Strikers Have Been Permanently Replaced

After the bargaining unit employees went on strike, the Company continued to publish the Ledger, relying on family, supervisory employees, and a few bargaining unit members who did not participate in the strike. Eventually, the Company hired temporary replacement workers. (D&O 8; Supp A 49-51.)

On January 5, 1996, the Union contacted the Company seeking to resume bargaining and requesting information concerning the temporary replacements. (D&O 9; Supp A 16-18, 29, 82, 94.) On February 22, the Union requested additional information, informing the Company that the information was necessary "in the event that our members make an unconditional offer to return to work." (D&O 9; Supp A 20.) By letter dated March 5, the Company responded, asserting that "[n]one of the temporary replacements are considered to be permanent replacements." (D&O 9-10; Supp A 23.)

The parties scheduled a bargaining session for March 14. On March 12, Ryan and Scott Kegel met with Donald Smith, a management consultant representing the Company in its negotiations with the Union. The Kegels informed Smith that they were happy with the replacement employees' job performance and that, if he could not reach an agreement with the Union soon, they would favor the

permanent replacement of the strikers. On March 13, the Kegels and Smith drafted a letter from Ryan Kegel to Smith, stating that he considered the temporary replacements "to be regular permanent employees." (D&O 10; Supp A 24, 107-08, 110.)

When the parties met on March 14, Smith began the session by stating that he understood that the Union planned to make an unconditional offer to return to work that day. (D&O 10; Supp A 62, 80, 95, 112.) The Union representative responded affirmatively, but indicated that he also needed some additional information. The parties debated several issues, including the wages that the strikers would receive upon their return. When the Union requested a list identifying the replacement workers and the jobs that they performed, the Company requested a caucus to consider the Union's request. (D&O 11; Supp A 35-37, 63.)

During the caucus, Smith and Scott Kegel met with Ryan Kegel at a nearby restaurant. When Smith and Scott reported that the negotiations were not progressing, Ryan instructed them to give the Union the March 13 letter indicating that the replacements were considered permanent. (D&O 11; Supp A 47, 52-53.) At the time, the Company had not contacted the replacement employees regarding any change in their employment status. (D&O 11; Supp A 47-48.)

When Smith and Scott Kegel returned to the bargaining session, they gave the Union the March 13 letter signed by Ryan Kegel. (D&O 11; Supp A 81.) In addition to stating that the strikers were permanently replaced, the letter also stated that the Company believed that the strike was an economic strike. (D&O 11; Supp A 24.) The bargaining session ended shortly after the Company produced the March 13 letter. (D&O 11; Supp A 96-99.)

Although the Union requested additional bargaining dates, the Company did not meet with the Union again until May 13, 1996, when they met for a brief, nonproductive session. (D&O 11; Supp A 84.) On May 15, Union President Campbell sent company representative Smith a letter, stating that he wished to "reconfirm" that "each of the employees represented by Local 261 is making an unconditional offer to return to work, at all times since March 14, 1996." (D&O 11; Supp A 25.) The Company never allowed the striking employees to return to their jobs, nor did the parties ever reach a collective-bargaining agreement.

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Truesdale and Member Fox, Member Hurtgen dissenting), in agreement with the administrative law judge, found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting bargaining unit photography work. In addition, the Board, in agreement with the administrative law judge, found that the Company violated

Section 8(a)(3) and (1) of the Act by falsely informing the strikers that they had been permanently replaced, and by failing to reinstate the discharged strikers upon their unconditional offer to return to work.

The Board's order requires the Company to cease and desist from engaging in the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O 19.) Affirmatively, the Board's order requires the Company to restore the status quo with respect to the n/w photography work performed by the regular, full-time photographer prior to April 15, 1995. The Board's order also requires the Company to offer full reinstatement to the unfair labor practice strikers; to make the unfair labor practice strikers whole; to make available relevant documents to the Board or its agents; and to post a remedial notice. (D&O 2-3.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. Board counsel are not aware of any other related case or proceeding that is completed, pending, or about to be presented to this Court, any other court, or any state or federal agency.

STATEMENT OF STANDARD OR SCOPE OF REVIEW

The Board's findings of fact are conclusive if they are supported by substantial evidence on the record as a whole. See Section 10(e) of the Act (29

U.S.C. § 160(e)); Universal Camera Corp. v. NLRB, 304 U.S. 474, 487-88 (1951); St. Margaret Memorial Hosp. v. NLRB, 991 F.2d 1146, 1151-52 (3d Cir. 1993). Moreover, the Board's inferences from the facts are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it de novo. See Universal Camera Corp., 340 U.S. at 488; accord Hedstrom Co. v. NLRB, 629 F.2d 305, 316 (1980) (en banc), cert. denied, 450 U.S. 996 (1981). The Board's legal conclusions are entitled to deference on review and should be upheld if reasonable. See Resorts Int'l Hotel Casino v. NLRB, 996 F.2d 1553, 1556 (3d Cir. 1993); NLRB v. New Jersey Bell Tel. Co., 936 F.2d 144, 150 (3d Cir. 1991).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company unlawfully subcontracted bargaining unit photography work. When the Company assigned n/w photography work to its full-time photographer as part of his regular duties, that work became an integral part of his job. Accordingly, when the Board certified the Union four months later, the Company's full-time photographer position included n/w photography work. As a result, the Company, which was required to maintain the status quo in effect at the time of the Union's certification, violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting the n/w photography work to stringers.

The Company's contention that its unilateral subcontracting of bargaining unit work was justified by past practice is without merit. Even though the Company had previously subcontracted the n/w photography work, the record establishes that at the time of the Union's certification, the n/w photography work was an integral part of the full-time photographer's position. Because the Company was required to maintain the status quo during the parties' negotiations, the Company's subcontracting of that bargaining unit work violated the Act, irrespective of the Company's occasional subcontracting of n/w work to stringers.

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by falsely informing the Union that the strikers had been permanently replaced. It is undisputed that, in the course of negotiations, the Company learned that the Union planned to make an unconditional offer to return to work. The Company preempted the Union's offer by informing the Union that the strikers had been permanently replaced before it had notified the temporary replacements of any change in their status. Because the Company notified the Union before it had any mutual understanding with the replacement workers regarding their new status, the Company's false declaration effectively discharged the strikers, in violation of the Act.

Finally, substantial evidence supports the Board's finding that, because the strikers were engaged in an unfair labor practice strike, the Company violated

Section 8(a)(3) and (1) of the Act by failing to immediately reinstate the strikers upon their unconditional offer to return to work. Because the employees' decision to strike was based, at least in part, on the Company's unlawful subcontracting of bargaining unit work, the Board reasonably found that the strike was an unfair labor practice strike. Furthermore, even if the strike did not begin as an unfair labor practice strike, substantial evidence supports the Board's alternative finding that the strike was converted to an unfair labor practice strike because the Company's false declaration that the strikers had been permanently replaced prolonged the strike.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY SUBCONTRACTING BARGAINING UNIT PHOTOGRAPHY WORK

A. Applicable Principles

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." Further, Section 8(a)(5) of the Act, as augmented by Section 8(d) (29 U.S.C. § 158(d)), requires an employer to bargain over "wages, hours, and other terms and conditions of employment." Accordingly, an employer

violates Section 8(a)(5) and (1)[3] of the Act "if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." Litton Financial Printing Div. v. NLRB, 501 U.S. 190, 198 (1991); accord NLRB v. Katz, 369 U.S. 736, 743-48 (1962); Hedstrom Co. v. NLRB, 629 F.2d 305, 317 (3d Cir. 1980)(en banc), cert. denied, 450 U.S. 996 (1981). Such conduct is found violative of the Act because, by unilaterally changing employees' terms and conditions of employment, an employer "minimizes the influence of organized bargaining" and emphasizes to employees "that there is no necessity for a collective bargaining agent." May Dep't Stores Co. v. NLRB, 326 U.S. 376, 385 (1945).

Where parties are engaged in negotiations for an initial contract, the prohibition against unilateral changes continues "unless and until an overall impasse has been reached on bargaining for the agreement as a whole." Bottom Line Enterprises, 302 NLRB 373, 374 (1991), enforced sub. nom, 15 F.3d 1087 (9th Cir. 1994).[4] See also NLRB v. Katz, 369 U.S. 736, 742-47 (1962) (employer

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[3] Section 8(a)(1) establishes that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under Section 7 of the Act. A violation of Section 8(a)(5) results in a "derivative violation" of Section 8(a)(1). See NLRB v. Newark Morning Ledger Co., 120 F.3d 262, 265 and n.1, 267 (3d Cir.), cert. denied, 314 U.S. 693 (1941).

[4] Although the Board in Bottom Line recognized two narrow exceptions to that rule, including the existence of economic exigencies, see Bottom Line, 302 NLRB at 374, the Company did not raise either exception as a defense in its opening brief. Accordingly, the Company has waived that argument. See NLRB

violates Act by undertaking unilateral action where parties are engaged in bargaining for an initial contract). Thus, when a union is newly certified, the employer must maintain the existing terms and conditions of employment--the status quo--while the parties bargain.

The allocation of bargaining unit work is a term or condition of employment. See, e.g., Road Sprinkler Fitters Local Union No. 669 v. NLRB, 676 F.2d 826, 831 (D.C. Cir. 1982). Accordingly, an employer violates Section 8(a)(5) and (1) by unilaterally diverting or subcontracting work allocated to the bargaining unit at the time of the Union's certification. See Acme Die Casting, 315 NLRB 202, 202 n.1 (1994) (employer violated Act by subcontracting unit work while parties were negotiating for initial contract).

B. The Company Unlawfully Subcontracted Bargaining Unit Photography Work

Substantial evidence supports the Board's finding (D&O 11) that, as of August 1993, the Company's n/w photography work became "an integral part of the regular full-time photographer's work," and therefore became bargaining unit work. As discussed above (p. 4), it is undisputed that, by 1993, the workload of the full-time photographer had declined to the point that there was not enough

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v. Konig, 79 F.3d 354, 356 n.1 (3d Cir. 1996); see also NLRB v. P*I*E Nationwide, Inc., 923 F.2d 506, 516 n.13 (7th Cir. 1991) (party barred from asserting argument not raised in opening brief).

work to sustain the full-time bargaining unit position. Thus, in August 1993, when the Company assigned the n/w work to Dimeo, that work became a necessary and integral part of the full-time photographer's position. This is demonstrated by the Company's reaction to the Union's June 4 request to have the n/w work removed from Dimeo's duties: the Company refused and informed the Union that it would not give Dimeo 40 hours' pay for part-time work. (D&O 1, 7; Supp A 101.) That, along with undisputed evidence that Dimeo did not receive additional remuneration for his n/w work, supports the Board's finding (D&O 1-2) that the Company "made n/w work part of the regular duties of the full-time photographer position." (D&O 7; Supp A 55.)

Because the n/w work became bargaining unit work in August 1993, it follows that under the status quo at the time of the Union's certification in December 1993, the full-time photographer's position included n/w photography work. Accordingly, the Company violated the Act by unilaterally subcontracting the bargaining unit work during bargaining. See Adair Standish Corp. v. NLRB, 912 F.2d 854, 863-64 (6th Cir. 1990) (employer violated Act by instituting changes in employees' schedules following union's certification); Acme Die Casting, 315 NLRB 202, 202 n.1 (1994) (employer violated Act by subcontracting unit work while parties were negotiating for initial contract).

C. The Company's Claim that Its Unilateral Action Was Justified by Past Practice Is Without Merit

There is no merit to the Company's assertion (Br. 20-30) that its subcontracting of bargaining unit photography work was consistent with "past practice" and therefore did not constitute a unilateral change. In making this argument, the Company (Br. 28) relies on evidence that, prior to August 1993, the n/w work had been performed exclusively by stringers, and that, even after the Company's assignment of n/w work to the full-time photographer position, it occasionally continued to utilize stringers to take n/w photos. Based on this evidence, the Company contends (Br. 28-30) that its decision in March 1995 to subcontract the n/w work assigned to the full-time photographer to stringers was consistent with its past practice, and therefore did not constitute a unilateral change.

To be sure, where an employer's action does not involve a unilateral change in the status quo, but rather a continuation of an uninterrupted, established past practice, its action does not violate the Act. See Bryant & Stratton Business Institute v. NLRB, 140 F.3d 169, 176 (2d Cir. 1998) (employer did not violate Act where its required use of a sign-in board was a "reaffirmation of its previous policy and not a change in the employees' terms and conditions of employment"). Here, however, the Company's argument falls short because it fails to recognize that the crucial inquiry is what constituted the status quo at the time of the Union's

certification. As shown above (pp. 16-17), at the time of the Union's certification, the full-time photographer position included the performance of the bulk of the n/w photography work. Thus, although the Company also used stringers to perform a small part of the n/w work, the n/w work was an integral part of the full-time photographer's job. For this reason, the Board reasonably focused on the duties of the full-time photographer, rather than the stringers, and found that by removing work from that bargaining unit position, the Company unilaterally changed the terms and conditions of the full-time photographer's employment. Accordingly, the Company's action was not consistent with a past practice, and therefore violated Section 8(a)(5) and (1) of the Act. See Road Sprinkler Fitters Local Union No. 669 v. NLRB, 676 F.2d 826, 831 (D.C. Cir. 1982) ("allocation of work to a bargaining unit is a term and condition of employment, and an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling its statutory duty to bargain") (internal quotation marks omitted).

In support of its assertion that its unlawful subcontracting was justified as the continuation of a "dynamic status quo," the Company relies (Br. 24-27) upon several cases in which a past practice was found. Those cases, however, actually support the Board's position here. In those cases, the Board and the courts examined the status quo at the time of the employer's unilateral action to determine whether a past practice existed; only where a consistent, uninterrupted past practice

was in effect at the time of the union's certification was the employer allowed to take action consistent with that established practice. See, e.g., NLRB v. Beverly Enterprises-Massachusetts, Inc., 174 F.3d 13, 26-29 (1st Cir. 1999) (employer required to adhere to policies regarding wages and lost timecard fees in place at time of union's certification); Bryant & Stratton Business Institute, Inc. v. NLRB, 140 F.3d 169 (2d Cir. 1998) (employer's memorandum informing employees that they would be required to use "sign-in" boards did not constitute a unilateral change because the employer's memorandum was merely a restatement of the employer's established policy); Hyatt Corp. v. NLRB, 939 F.2d 361, 371-72 (6th Cir. 1991) (employer required to follow established practice of awarding wage increases in effect at time of election). In the instant case, the Board similarly examined the status quo at the time of the Union's recognition and found that the Company had an established practice of including most of the n/w photography work in the full-time photographer's regular duties. As a result, the Board reasonably found (D&O 1) that the Company violated the Act by unilaterally departing from the status quo.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY FALSELY INFORMING THE UNION THAT THE STRIKING EMPLOYEES HAD BEEN PERMANENTLY REPLACED AND BY FAILING TO IMMEDIATELY REINSTATE THE STRIKERS UPON THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

A. Introduction

The right of employees to engage in a lawful strike is embodied in Section 13 of the Act (29 U.S.C. § 163) and is fundamental to the Act. NLRB v. Erie Resistor Corp., 373 U.S. 221, 233-35 (1963); NLRB v. International Rice Milling Co., 341 U.S. 665, 672-73 & nn. 6-8 (1951). All striking workers retain their status as "employees" under the Act. See 29 U.S.C. 152(3). Striking workers fall within two categories: economic strikers, who are striking over recognition or bargaining demands, and unfair labor practice strikers, who are motivated, at least in part, by their employer's commission of an unfair labor practice. See General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1311-12 (D.C. Cir. 1991). One fundamental difference between economic strikers and unfair labor practice strikers is that the latter enjoy greater reinstatement rights. Specifically, economic strikers are entitled, upon their unconditional offers to return to work, to reinstatement to their former or substantially equivalent positions, if no permanent

replacements have been hired to replace them and the positions remain open.[5] NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378-79 (1967); accord NLRB v. American Linen Supply Co., 945 F.2d 1428, 1431 (8th Cir. 1991); George Banta Co. v. NLRB, 686 F.2d 10, 21 n.13 (D.C. Cir. 1982), cert. denied, 460 U.S. 1082 (1983). Unfair labor practice strikers, by contrast, are entitled to immediate reinstatement upon their unconditional offer to return to work, and any replacements hired during the strike must be dismissed if necessary to effect their reinstatement. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956); Hajoca Corp. v. NLRB, 872 F.2d 1169, 1177 (3d Cir. 1989); NLRB v. Cast Optics Corp., 458 F.2d 398, 407 (3d Cir.), cert. denied, 409 U.S. 850 (1972).

B. The Company Violated the Act by Falsely Informing Striking Employees that They Were Permanently Replaced

1. Applicable principles

Under Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)), it is an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage" union membership. Accordingly, an employer violates Section 8(a)(3) and (1) of the Act

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[5] If economic strikers have been permanently replaced, they are entitled to be placed on a preferential hiring list.

by discharging employees because of their union activity. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-98, 401 (1983).

Although the right to strike does not prevent an employer from hiring permanent replacements during an economic strike, "the discharge of economic strikers prior . . . to the time their places are filled" violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). NLRB v. International Van Lines, 409 U.S. 48, 52 (1972) (internal quotations omitted); accord NLRB v. American Linen Supply Co., 945 F.2d 1428, 1431 (8th Cir. 1991); NLRB v. Mars Sales & Equipment Co., 626 F.2d 567, 573 (7th Cir. 1980). In order for replacement workers to be considered permanent, the employer and the replacements must have a "mutual understanding" regarding their permanent status. NLRB v. Augusta Bakery Corp., 957 F.2d 1467, 1473 (7th Cir. 1992).

In accordance with the foregoing principles, the Board, with judicial approval, has held that an employer's false declaration that strikers have been permanently replaced effectively discharges the employees, because the effect of that action is to withhold from strikers the right to return to their unoccupied jobs "simply because they have gone out on strike." American Linen Supply Co., 297 NLRB 137, 137 (1989), enforced, 945 F.2d 1428 (9th Cir. 1991). See also International Van Lines, 409 U.S. at 50, 53 (statement that striking employees "are being permanently replaced" constituted unlawful discharge, when permanent

replacements had not been hired); W.C. McQuaide, Inc., 237 NLRB 177, 179 (1978) (falsely informing strikers that they had been permanently replaced constituted unlawful discharge), enforced, 617 F.2d 349 (3d Cir. 1978).

2. The Company's false declaration violated the Act

Substantial evidence supports the Board's finding (D&O 2, 17) that, by falsely informing the striking employees that they had been permanently replaced, the Company violated Section 8(a)(3) and (1) of the Act. The Company concedes (Br. 11) that, on March 14, it gave the Union a letter indicating that, as of March 13, it considered its replacement workers to be permanent hires. The Company further concedes (Br. 11) that it did not advise the replacements that they had become permanent employees until March 15. Thus, it is undisputed that the Company and the replacement workers did not have a mutual understanding regarding the replacements' status at the time that the Company presented the March 13 letter to the Union. Therefore, substantial evidence supports the Board's finding that the Company informed the Union that the strikers were permanently replaced before they had actually been permanently replaced, thereby violating Section 8(a)(3) and (1) of the Act. See NLRB v. American Linen Supply Co., 945 F.2d 1428, 1431 (8th Cir. 1991); NLRB v. Mars Sales & Equipment Co., 626 F.2d 567, 573 (7th Cir. 1980).

Although the cases cited above (pp. 23-24) involve false declarations made to economic strikers, the principle is equally applicable to unfair labor practice strikers. It is well-established that unfair labor practice strikers have more, not fewer, rights and protections under the Act than economic strikers. See, e.g., Pirelli Cable Corp. v. NLRB, 141 F.3d 503, 519 (4th Cir. 1998) ("[u]nfair labor practice strikers have more rights and protections" than economic strikers); George Banta Co. v. NLRB, 686 F.2d 10, 20 (D.C. Cir. 1982) (the statutory rights of economic and unfair labor practice strikers are "identical," except for unfair labor practice strikers' greater reinstatement rights). It follows, therefore, that because the Board has consistently found that economic strikers have the right not to be preemptively discharged by being falsely informed that they have been permanently replaced, unfair labor practice strikers are entitled to that same protection under the Act.

Furthermore, at the time of the Company's actions, it had not yet been determined whether the striking employees were economic or unfair labor practice strikers. In fact, the Company's March 13 letter establishes that, at the time that the Company informed the Union of the permanent replacement of the strikers, the Company considered the strikers to be economic strikers. (D&O 17; Supp A 24.) By informing the strikers that they were economic strikers and were permanently replaced, the Company preempted their ability to make an unconditional offer to

return to work. Therefore, the effect of the Company's unlawful conduct was the same, regardless of whether the strikers were unfair labor practice strikers, as the Board found (D&O 13),[6] or economic strikers.

Despite the clear evidence to the contrary, the Company asserts (Br. 48) that its March 14 statement, in which it informed the Union that it considered the replacements to be permanent, was truthful because it accurately reflected the Company's view of the replacement workers' status. That assertion is wholly without merit.

In interpreting the March 13 letter, it is significant to note that the Company did not indicate that the strikers would be permanently replaced, nor did the Company post-date the letter to allow time to communicate their changed status to the replacement workers. To the contrary, the Company's letter emphasizes that the change occurred "as of" March 13. As a result, the Board reasonably interpreted the letter as falsely informing the Union that the strikers were permanently replaced as of March 13. Furthermore, the Board reasonably found (D&O 17) that the Company's intent in writing and delivering the letter on March 14 was reflected in the message of the letter: specifically, that because the strikers

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[6] Of course, should this Court decide that the strikers were economic strikers at the time of the false declaration, the Company's action would still clearly violate Section 8(a)(3) and (1) of the Act. See International Van Lines, 409 U.S. at 50, 53; W.C. McQuaide, 237 NLRB at 179.

were permanently replaced, it was futile for the Union to make an unconditional offer to return to work.[7]

The Company's reliance (Br. 54) on Noel Foods v. NLRB, 82 F.3d 1113, 1119-20 (D.C. Cir. 1996), is misplaced. In that case, the employer notified its employees, prior to the beginning of a strike, that they would be permanently replaced. In finding that the employer's conduct did not violate the Act, however, the Noel court determined that the employer had taken all possible steps toward the hiring of permanent replacements prior to the employees going out on strike, and that, therefore, the employer's statement was not misleading. In the instant case, by contrast, the Company took no steps whatsoever toward arranging for the replacements to become permanent prior to informing the Union that the strikers were permanently replaced.

Further, the Company's suggestion (Br. 51) that its deception was inconsequential because it informed the replacements of their new status the next day is without merit. It is irrelevant how long it took the Company to notify the replacements after notifying the strikers. Instead, the focus is on whether the

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[7] Contrary to the Company's contention (Br. 53), the language in the March 13 letter informing the strikers that they had been permanently replaced effectively conveyed that the strikers were discharged. See International Van Lines, 409 U.S. 48, 49-50 (1972) (employer's telegram informing employees that they had been permanently replaced was sufficient to establish employees' discharge).

Company's communication was a misrepresentation and the effect of the misrepresentation. Here, the misrepresentation enabled the Company to preempt the Union's unconditional offer to return to work, thereby affording the Company the opportunity to actually hire permanent replacements. Thus, the one day is took for the Company to make its falsehood a reality is significant.

Finally, the Company's assertion (Br. 53) that its misrepresentation did not violate the Act because it was made to the employees' union representatives, rather than directly to the strikers, is meritless. To begin, the Company's argument is factually inaccurate because, as it concedes (Br. 53), its message was directly delivered to two striking employees who were part of the Union's bargaining team. Moreover, even if its contention were factually accurate, the Company fails to cite a single case to support its argument. Furthermore, that the Company's misrepresentation was made to the Union representatives is critical: it is well settled that unions can tender offers of reinstatement on behalf of employees they represent, and it is clear that the union representatives intended to do so here until the Company falsely asserted that it was too late.

B. Substantial Evidence Supports the Board's Findings that the Strikers Were Engaged in an Unfair Labor Practice Strike and, Therefore, that the Company Violated the Act by Failing To Immediately Reinstate the Strikers Upon Their Unconditional Offer to Return to Work

An unfair labor practice strike is any strike that is caused "at least in part" by an employer's unfair labor practice. Struthers Wells Corp. v. NLRB, 721 F.2d 465, 471 (3d Cir. 1983) (citing Latrobe Steel Co. v. NLRB, 630 F.2d 171, 181 (3d Cir. 1980), cert. denied, 454 U.S. 821 (1981)). As this Court has recognized, it is immaterial whether other reasons for a strike exist, for "if an unfair labor practice had anything to do with causing" a strike, that strike is an unfair labor practice strike. NLRB v. Cast Optics Corp., 458 F.2d 398, 407 (3d Cir.), cert. denied, 409 U.S. 850 (1972). Furthermore, a strike that begins as an economic dispute can be converted to an unfair labor practice strike if an employer's subsequent unfair labor practice aggravates or prolongs the strike. NLRB v. Frick Co., 397 F.2d 956, 964 (3d Cir. 1968); accord General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1311-12 (D.C. Cir. 1991); NLRB v. Champ Corp., 933 F.2d 688, 694 (9th Cir. 1990), (violations of Act that "aggravate or prolong an economic strike will convert it to an unfair labor practice strike"), cert. denied, 502 U.S. 957 (1991). Whether a strike is an unfair labor practice strike is a factual issue on which the Board's findings are conclusive if supported by substantial evidence on

the record as a whole. See Columbia Portland Cement Co. v. NLRB, 915 F.2d 253, 259 (6th Cir. 1990).

As discussed above, unfair labor practice strikers are entitled to full reinstatement upon their unconditional request to return to work. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956); Hajoca Corp. v. NLRB, 872 F.2d 1169, 1171 (3d Cir. 1989); Cast Optics Corp., 458 F.2d at 407. A failure to reinstate unfair labor practice strikers constitutes discrimination in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. 158(a)(3) and (1)), because it has the effect of discouraging employees from exercising their rights to organize and to strike guaranteed by Sections 7 and 13 of the Act. See Mastro Plastics Corp., 350 U.S. at 278; Struthers Wells Corp., 721 F.2d at 471.

The Company concedes (Br. 11) that, as the Board found (D&O 17), the striking employees made an unconditional offer to return to work on May 15, 1996. Further, it is undisputed that the Company has failed to reinstate the employees following their offer. Therefore, the sole issue is whether the Board's finding that the employees were engaged in an unfair labor practice strike is supported by substantial evidence.

In concluding that the employees were engaged in an unfair labor practice strike, the Board found (D&O 13) that the employees' decision to strike was based, at least in part, on the Company's unlawful subcontracting of bargaining unit

photography work. As discussed above (p. 7), the Board found (D&O 8) that the Union convened a meeting of bargaining unit members on the day before the strike began. At that meeting, the Union discussed the Company's unlawful removal of n/w work from the full-time photographer's duties, and notified the employees that the Board's regional office would be issuing a complaint against the Company based upon that unfair labor practice. After learning of the Company's unilateral action, numerous employees indicated their desire to go on strike, and the membership held a strike vote. This evidence amply supports the Board's finding (D&O 13) that the Board's decision to issue a complaint "galvanized the bargaining unit members' belief that an unfair labor practice ha[d] been committed and served as the flashpoint for discussion about calling a strike." See Calex Corp. v. NLRB, 144 F.3d 904, 911 (6th Cir. 1998) (employees' discussion of employer's unfair labor practice at pre-strike meeting significant in finding unfair labor practice strike); Northern Wire Corp. v. NLRB, 887 F.2d 1313, 1320 (7th Cir. 1989) (Board properly relied upon employee discussions at union meetings in finding decision to strike was motivated by employer's unfair labor practices); Head Div., AMF, Inc. v. NLRB, 593 F.2d 972, 980-81 (10th Cir. 1979) (evidence that employer's unfair labor practices "figured prominently" in employees' pre-strike discussions supported finding of unfair labor practices strike).

Furthermore, even if the Company's subcontracting of n/w work did not constitute an unfair labor practice, the Company's discharge of the striking employees on March 14, 1996, converted the strike to an unfair labor practice strike because it prolonged the strike. See cases cited at p. 29. As the Board found (D&O 17 n.64), the Company's false declaration that it had permanently replaced the strikers prolonged the strike by thwarting the Union's attempt to make an unconditional offer to return to work that day. Indeed, as shown above (p. 9), the Union informed the Company at the March 14 bargaining session of its intent to make an unconditional offer to return to work. Before the Union could make its offer, however, the Company preemptively notified the Union that it considered the strikers to be permanently replaced, thereby in effect informing the Union that any unconditional offer to return to work would be futile. Accordingly, the Board reasonably found that, even if the strike began as an economic strike, the Company's false and unlawful declaration prolonged the strike and converted it to an unfair labor practice strike. See NLRB v. Champ Corp., 933 F.2d 688, 694-95 (9th Cir. 1990) (employer's conduct that effectively derailed contract negotiations, thereby prolonging strike, converted strike to unfair labor practice strike), cert. denied, 502 U.S. 957 (1991).

The Board reasonably rejected (D&O 13 n.42) the Company's contention (Br. 44) that its unlawful subcontracting could not have had a causal connection to

the decision to strike because the strike vote did not occur until three months after the Company's action. Contrary to the Company's claim, a lapse in time between unfair labor practices and a strike "is not conclusive in establishing the basis for a strike." Burns Motor Freight, 250 NLRB 276, 277-78 (1980); accord Lapham-Hickey Steel Corp v. NLRB, 904 F.2d 1180, 1187 (7th Cir. 1990) (finding unfair labor practice strike, despite lapse of more than seven months between unfair labor practices and strike). Here, in any event, the passage of time is easily understood: the union representatives did not convene the employees until the Board's regional office had determined that the Company's unlawful subcontracting was, in fact, an unfair labor practice. Furthermore, the Board's finding of causation is supported by evidence that union representatives and members discussed the Company's illegal subcontracting, as well as the Board's decision to issue a complaint against the Company, at the meeting at which the strike vote was taken.[8] (D&O 8; Supp A 60, 73-76, 86, 90-92.)

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[8] For this reason, the Board (D&O 13 n.41) reasonably rejected the Company's assertion (Br. 38-39) that, because the Union provided bargaining committee members with misleading information, the strike was not an unfair labor practice strike. Substantial evidence supports the Board's finding (D&O 13) that in deciding to strike, the employees were motivated by the Company's unfair labor practice, not by the Union's misrepresentation. Furthermore, as the Board found (D&O 13 n.41), the Union only made the misrepresentation to the five employee members of the bargaining committee, not to the bargaining unit as a whole.

Similarly, there is no merit to the Company's argument (Br. 46-47) that only the Union's motivation, and not the striking employees' motivation, is relevant to the Board's determination of the cause of a strike. To begin, as cited above (p. 29), this Court has recognized that where an employer's unfair labor practice has "anything to do" with the decision to strike, the strike is an unfair labor practice strike. NLRB v. Cast Optics Corp., 458 F.2d 398, 407 (3d Cir.), cert. denied, 409 U.S. 850 (1972). Consistent with that standard, the Board has repeatedly relied on evidence of the strikers' motivation to show that a strike is based, at least in part, upon their employer's unfair labor practice. See, e.g., Alwin Mfg. Co. v. NLRB, 192 F.3d 133, 141-42 (D.C. Cir. 1999) (striking employees' motivation for striking central to finding of unfair labor practice strike); Calex Corp. v. NLRB, 144 F.3d 904, 911 (6th Cir. 1998) (employees' discussion at pre-strike meeting significant in finding unfair labor practice strike). The Company fails to cite any case in which the Board or the courts have applied a different rule.[9]

For all these reasons, the Board reasonably found (D&O 17) that the strikers were unfair labor practice strikers. Therefore, the Company violated Section

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[9] The Company's reliance upon General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308 (D.C. Cir 1991) is misplaced; in that case, the court explicitly states that it examines "employees' motivation" in determining the nature of a strike. Id. at 1313.

8(a)(3) and (1) of the Act by failing to immediately reinstate the strikers upon their unconditional offer to return to work.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that judgment enter enforcing the Board's order in full. The Board also respectfully requests that the Company's petition for review be denied.

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February 2001

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CITIZENS PUBLISHING AND PRINTING COMPANY, RYAN KEGEL AND SCOTT KEGEL, Alter Egos Petitioner/Cross-Respondent	)	
v.	)	Case Nos. 00-2825, 00-3758
NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,893 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 97 SR-2.

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Dated at Washington, D.C.
this 5th day of February, 2001

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v.	
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Respondent/Cross-Petitioner	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Board's motion to file a supplemental appendix has this day been served by first-class mail upon the following counsel at the address listed below:

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